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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Forbearance From Applying Provisions	)	WT Docket No. 98-100
of the Communications Act to Wireless	)	
Telecommunications Carriers	)	

COMMENTS OF BELL ATLANTIC MOBILE, INC.

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COMMENTS OF BELL ATLANTIC MOBILE, INC.

Bell Atlantic Mobile, Inc. (BAM) submits these initial comments on the Commission's Notice of Proposed Rulemaking in this proceeding (FCC 98-134, released July 2, 1998) (Notice). The Commission asks whether it should forbear from enforcing additional provisions of the Telephone Operators Consumer Services Improvement Act (TOCSIA) against CMRS providers (Notice at ¶¶ 89-110). It also asks how to apply Section 10 of the Communications Act, the statutory forbearance directive, to other provisions of the Act and Commission Rules affecting wireless providers (Id. at ¶¶ 111-118).

SUMMARY

The Commission has not fulfilled the deregulatory mandates of the 1993 and 1996 amendments to the Communications Act. Instead, the agency has repeatedly imposed regulations on CMRS, without a record basis and without considering the distinct technical and economic characteristics of CMRS. Then, when parties seek

reconsideration of or forbearance from these regulations and show that they actually harm competition, the Commission fails to act. As a result, CMRS, which started as a competitive industry and has become even more competitive, finds itself saddled with more regulation, not less.

The Notice continues down this wrong path by viewing it as the CMRS industry's burden to justify lifting regulations which should never have been imposed in the first place. Its discussion of forbearance threatens to impose an unlawful standard for removing unnecessary rules. The Commission, like other federal agencies, has a fundamental duty to reassess its regulations constantly and rescind rules that are no longer justified. But the Notice proposes to subject this process to new, stricter requirements, in the name of "implementing" Section 10. The perverse result would be that the forbearance process, which Congress enacted to promote deregulation, would in fact make deregulation harder.

The Commission should terminate this new and unneeded general inquiry into standards for forbearance. It should instead act without further delay on the many long-pending proceedings to remove or modify specific rules that apply to CMRS, including wireless number portability, rate integration, CPNI, the CMRS spectrum cap, mandatory resale, and CMRS disaggregation and partitioning. Continued inaction leaves in place rules that lack any proven justification, impose burdens on new entrants as well as existing providers, and impede CMRS carriers from competing for and serving subscribers.

I. THE COMMISSION HAS NOT FOLLOWED CONGRESS'S DEREGULATORY MANDATE.

In 1993, Congress rewrote Section 332 of the Act to codify a new federal policy for regulating mobile radio services.[1] The new paradigm relied on market forces rather than government regulation to promote a customer-responsive mobile services industry. Mobile services were not to be regulated as traditional utilities. Instead they were to be free of much of the detailed regulation governing services that did not face competition.

The FCC promptly issued three major decisions implementing Section 332, all of which followed the mandate from Congress to rely on competition rather than regulation. In its first decision, renaming those services subject to Section 332 as "Commercial Mobile Radio Services," the FCC proclaimed:

> We establish, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees that are classified as CMRS providers.[2]

Its next decision, which eliminated or modified many disparate rules, reaffirmed that this course

> is an essential step toward achieving the overarching Congressional goal of promoting opportunities for

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1 These changes are contained in Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b) ("OBRA").

2 Implementation of Section 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411, 1418 (1994).

> economic forces – not regulation – to shape the development of the marketplace.[3]

Finally, the Commission invoked its new CMRS preemption authority by striking down eight states' regulatory schemes for cellular carriers. It stated even more forcefully the rationale for strictly limiting CMRS regulation:

> In 1993, Congress amended the Communications Act to revise fundamentally the statutory system of licensing and regulating wireless (i.e., radio) telecommunications services. . . . OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce CMRS regulation, and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions.[4]

Congress, the FCC found, had placed primary reliance on market forces, and the Commission would follow that mandate:

> Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure.[5]

The FCC noted that this approach was specific to CMRS:

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3 Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988, 8004 (1994).

4 Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers, Order ("Connecticut Preemption Order"), 10 FCC Rcd 7025, 7031 (1995).

5 Id. at 7025 (emphasis added).

> We emphasize the important impact on our decision-making of these fundamental elements of the OBRA statutory framework, which have no counterparts in other sections of the Communications Act. They are devoted exclusively to wireless telecommunications services, and to CMRS in particular.[6]

Market forces, not traditional utility regulations, were to govern CMRS. Significantly, the Commission acknowledged that Congress had placed a heavy burden of justifying any CMRS regulation on the Commission.

Nothing in the 1996 Act changed Congress's deregulatory mandate for CMRS; in fact, many provisions in that Act directed the Commission to rely even more on market forces to regulate competitive industries. The Commission has repeatedly reported to Congress on the dramatic growth in CMRS competition, and has pointed to declining wireless prices and rapid new entry in touting the success of wireless competition.[7]

It is important to review this history because the Commission's recent decisions imposing new obligations on CMRS do not acknowledge it. They do not reconcile the goals of the 1993 amendments to Section 332 (and the Commission's own landmark orders implementing that provision) with the new regulations. They are inconsistent with Congress' deregulatory mandate and sound economic policy.

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6 Id. at 7032.

7 E.g., Third Annual Report on CMRS Competition, FCC 98-91, released June 11, 1998; see Remarks by Chairman Kennard to the National Association of State Utility Consumer Advocates, February 9, 1998; Remarks of Commissioner Susan Ness to the Economic Strategy Conference, March 3, 1998.

II. THE COMMISSION IS ARBITRARILY INCREASING REGULATORY BURDENS ON CMRS PROVIDERS.

The agency's recent regulation of CMRS is particularly unwarranted given the rapid growth in CMRS competition. In 1994, when CMRS faced at least one competitor in virtually every market, the Commission declared that it must satisfy the burden to justify new regulation, and would not regulate without a "clear cut need."[8] Since that time, CMRS competition has dramatically increased and many markets now have at least five or six facilities-based carriers. This growth in competition clearly justifies a commensurate reduction in regulation. Instead, the Commission has done just the opposite. The more competition CMRS providers face, the more regulatory burdens the Commission imposes on them.

If the Commission had developed a record showing that competition had led to marketplace abuses or harms to subscribers, the Commission's focus on imposing new regulation might be understandable. But there is no such record. To the contrary, the Commission repeatedly touts the benefits that growing competition is bringing to the public.[9] The Commission appears to have lost sight of its own CMRS-specific deregulatory policies, announced barely four years ago, and is failing to balance the growth in competition with more reliance on the market, thereby departing from Congress' mandate.

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8 Connecticut Preemption Order, supra n. 4, at 7025.

9 See n. 7, supra.

The problem is not merely that mounting requirements have been imposed on CMRS, but that those burdens have often resulted from a failure to consider the unique characteristics of wireless technologies and markets. For example, the Commission imposed wireless number portability requirements on CMRS providers even though it had no statutory obligation to do so and even though there was no number portability technology available to CMRS providers.[10] The Commission failed to address any of the problems specific to wireless number portability. Today, CMRS providers are still unable to purchase technology to meet that requirement. The Commission's expert Advisory Committee on numbering matters, the North American Numbering Council, recently stated that there remain numerous complex and unsolved problems, one of which, according to the NANC, makes it "impossible" for some wireless customers to port their numbers.[11]

Similarly, when the Commission imposed strict limits on the use of CPNI, it failed to consider that CMRS providers use CPNI to advise their customers of new digital services and the digital equipment needed to use these services. Even though both CMRS customers and competition benefit from this information, the

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10 Telephone Number Portability, First Report and Order, 11 FCC Rcd 8352 (1996). BAM, joined by intervenors CTIA, AirTouch, GTE and SBC, has asked a federal appeals court to overturn the wireless number portability rules on these and other grounds. Bell Atlantic NYNEX Mobile, Inc. v. FCC, No. 97-9551 (10th Cir.) (oral argument scheduled for September 24, 1998).

11 Report of the North American Numbering Council Local Number Portability Administration Working Group on Wireless-Wireline Integration, May 8, 1998, at § 3.1.1 (emphasis added).

Commission's CPNI rules deprive them of that opportunity. The rate integration requirements were similarly imposed without any analysis of whether and how these requirements should apply to the unique geographically-defined markets and competitive conditions existing for CMRS.

These and other actions reveal a consistent failure to consider the different technical and economic realities of CMRS. More fundamentally, these actions frustrate the specific federal deregulatory policy that is to govern CMRS.

III. THE NOTICE TAKES THE WRONG APPROACH TO FORBEARANCE.

Rather than act on the many petitions for forbearance and reconsideration of unwarranted CMRS rules already before it, the Commission embarks in the Notice on an effort to define the standards for forbearance. This effort is unnecessary because Section 10 already defines these standards. This effort is also misguided because it attempts to impose preconditions for forbearance that undermine Congress' deregulatory goal in enacting Section 10.

The Notice incorrectly presumes that CMRS petitioners bear the burden to justify forbearance, stating that in applying the "public interest" prong of Section 10, petitioners must "show whether the costs incurred by carriers to comply with particular provisions outweigh the benefits to the public to be gained in applying them." Id. at ¶ 115. This approach contradicts the Commission's own declarations in earlier decisions implementing Section 332, that the agency bears the burden of justifying CMRS regulations, and will impose rules only when there is a compelling

need to do so. This shift is particularly troubling because the Notice does not acknowledge those earlier rulings, let alone attempt to explain why they are consistent with its new approach. This change constitutes a major and unexplained, and thus unlawful, change in the agency's approach to CMRS regulation.[12]

By attempting to impose new standards for proving the elements of forbearance, the Notice also departs from the intent of Section 10. Congress enacted that provision as part of its effort "to provide for a pro-competitive, de-regulatory national policy framework" for telecommunications.[13] Forbearance was intended to facilitate deregulation by directing the Commission to avoid enforcing statutory or regulatory provisions that were no longer necessary. But the Notice would saddle CMRS forbearance with a host of evidentiary and other requirements, impeding its availability. As Commissioner Powell warns, the Notice's approach to CMRS forbearance would impose unwarranted burdens, "based on speculative fears and outdated rationales that raise the bar so high that future and pending forbearance petitions – even in the most competitive segment of the telecommunications

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12 Greater Boston Television Corp. v. FCC, 444 F.2d 8941, 852 (D.C. Cir. 1970) (where Commission changes policy, its must articulate a reasoned statutory basis); Mobile Communications Corp. v. FCC, 77 F.3d 1399, 1407 (D.C. Cir. 1996) (remanding FCC decision because agency failed to justify departure from prior policy); Monroe Communications Corp. v. FCC, 900 F.2d 351 (D.C. Cir. 1990 (FCC "must supply reasoned analysis" explaining change in policy).

13 H. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. (1996) at 1.

industry and in geographic markets that are fully competitive – do not seem to stand a chance."[14]

The Notice also disregards the obligation of the Commission (like other agencies) to review regulations to ensure that they remain valid. Courts have repeatedly told the Commission that where the factual premise for a rule changes or new facts point to a lack of need for the rule, the Commission must reexamine it.[15] The 1996 Act not only confirmed that obligation but made it even more specific by imposing the requirement that the Commission conduct a comprehensive review of all of its regulations every two years.[16] The Notice, however, would use the new forbearance remedy – intended to facilitate deregulation – to impose burdens and requirements on petitioners that did not exist prior to enactment of that remedy.

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14 PCIA Broadband Personal Communications Service Alliance's Petition for Forbearance for Broadband Personal Communications Services, FCC 98-134, Separate Statement of Commissioner Michael Powell, Dissenting in Part, July 2, 1998.

15 Federal courts have held that an agency cannot continue to adhere to rules when the original assumptions for those rules are no longer valid or have been overtaken by new facts. Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979) (reversing Commission for maintaining cable television rules after the factual premise for the rules had disappeared); Meredith v. FCC, 809 F.2d 863 (D.C. Cir. 1987) (reversing Commission where its findings in a later proceeding "largely undermined the legitimacy of its own rule."); Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992) (reversing Commission order; "it is settled law that an agency may be forced to reexamine its approach if a significant factual predicate of a prior decision . . . has been removed.").

16 Section 11 of the Act, 47 USC § 161, requires the Commission to conduct a "biennial review" of all regulations, "determine whether any such regulation is no longer necessary in the public interest," and "repeal any such regulations."

The perverse result would be to "raise the bar" for deregulation, in the name of a statutory provision that was intended to lower the bar.

IV. THE COMMISSION SHOULD GRANT PENDING FORBEARANCE REQUESTS AND COMPLETE OTHER PROCEEDINGS TO REMOVE UNWARRANTED RULES NOW.

Rather than devote its resources to a general inquiry into the forbearance process, the Commission should promptly complete long-pending proceedings to remove or modify unwarranted CMRS regulations.

For example, after the Commission imposed rate integration, wireless number portability, and CPNI obligations on CMRS providers, many parties filed forbearance requests. The resulting record shows that the three prongs of Section 10 forbearance are met in each case. These proceedings, however, appear to be languishing. Petitions for forbearance from extension of the rate integration rules to CMRS were filed in October 1997, ten months ago.[17] A petition for forbearance from the wireless number portability rules were filed in December 1997.[18] Petitions for forbearance from applying three of the CPNI rules to wireless providers were

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17 E.g., PCIA Petition for Forbearance or Reconsideration, filed October 3, 1997; CTIA Petition for Clarification, Further Reconsideration and Forbearance, filed October 3, 1997; Primeco Communications L.P., Petition for Reconsideration or in the Alternative Petition for Forbearance, filed October 3, 1997.

18 CTIA Petition for Forbearance, filed December 16, 1997.

filed in May 1998.[19] The CPNI petitions followed the Commission's refusal to grant requests for a temporary stay of these few rules for CMRS,[20] even though no party opposed a stay and the uncontradicted record showed that the rules were harmful to CMRS competition and subscribers.

The same delays have occurred in many other proceedings involving rules that cannot be squared with Congress' deregulatory mandate or the realities of the CMRS marketplace:

- In two 1994 orders, the Commission adopted "spectrum caps" to restrict aggregating CMRS spectrum, and then extended those caps to apply to management and joint marketing agreements involving CMRS systems.[21] Numerous petitions for reconsideration of both requests were filed at the end of 1994 and have been pending for three and a half years. In 1996, the Commission decided to retain a CMRS-wide spectrum cap.[22] Again,

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19 E.g., CTIA Petition for Reconsideration and Forbearance, filed May 20, 1998; GTE Petition for Forbearance, Reconsideration and/or Clarification, filed May 20, 1998; 360 Degree Communications Company Petition for Reconsideration and Clarification or Forbearance, filed May 26, 1998; Commnet Cellular Petition for Reconsideration and Forbearance, filed May 26, 1998.

20 CTIA Request for Deferral and Clarification, filed April 24, 1998; GTE Petition for Temporary Forbearance or Motion for Stay, filed April 29, 1998.

21 Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order, 9 FCC Rcd 7988 (1994); Fourth Report and Order, 9 FCC Rcd 7123 (1994); see 47 CFR § 20.6.

22 Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, 11 FCC Rcd 7824 (1996).

petitions for reconsideration were filed; but again, they have not been acted on.[23]

- In 1996, despite growing CMRS competition, the Commission expanded the scope of the CMRS resale rule by extending it to PCS and certain SMR providers, and removing the exception to the rule that did not require resale to facilities-based carriers after a certain period.[24] Reconsideration petitions challenging that action have been pending for nearly two years.[25]
- In 1996, the Commission adopted rules to permit spectrum disaggregation and service area partitioning for PCS providers, and proposed to grant competing cellular and other CMRS providers symmetrical rights.[26] Despite acknowledging the importance of regulatory parity among competing providers and the benefits of these proposals for increased

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23 Delay on long-pending challenges to the CMRS spectrum cap is particularly unjustified given the rapid entry of new CMRS competitors since the cap was imposed, and given the Commission's declaration in February 1998 that the spectrum cap was a candidate for repeal under the "biennial review" process mandated by Section 11 of the Act. "FCC Staff Proposes 31 Proceedings as Part of 1998 Biennial Regulatory Review," February 5, 1998, at 4. Even though more than six months have elapsed since that announcement, no action has been taken to repeal or modify the spectrum cap.

24 Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order, 11 FCC Rcd 18455 (1996).

25 E.g., Nextel Petition for Reconsideration or Clarification, filed August 23, 1996; CTIA Petition for Reconsideration, filed August 23, 1996.

26 Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21831 (1996).

competition and more efficient spectrum usage, the Commission has taken no action for the past year and a half.

BAM urges the Commission to complete work on these proceedings now. The record shows that these rules impair competition, that they impose costs on carriers which reduce the resources available to build out wireless networks and invest in new wireless technologies, and that they impair carriers' ability to compete. Continued failure to act violates Congress's mandate for only limited regulation of CMRS and allows rules that unnecessarily impair service to customers to remain.

CONCLUSION

The Commission must fundamentally rethink its approach to CMRS and forbearance. It must return to a paradigm that relies on competitive markets to ensure market growth and services to subscribers, and on the array of enforcement remedies that are available in the rare situations where government intervention is needed.[27] It must grant the pending forbearance petitions and complete other

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[27] E.g., 47 USC §§ 201, 202, 207, and 208.

proceedings that will remove unwarranted regulations that impede the ability of CMRS providers to compete and serve their subscribers.

Respectfully submitted,

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